ARUMUGAM A/L MOTHIYAH

v.

PUBLIC PROSECUTOR

HIGH COURT MALAYA, TAIPING
DATO' HJ. ABDUL MALIK B. HJ. ISHAK J.
[CRIMINAL APPEAL NO. 52-19-94]
4 OCTOBER 1994

EVIDENCE*: Child evidence - Charge of rape - Failure of trial Court to apply s. 133A of Evidence Act, 1950 before recording evidence of child - Effect - Section 8 Oaths and Affirmations Act, 1949 - Whether complied with.*

EVIDENCE: *Defence of alibi - Section 402A Criminal Procedure Code - Evidential burden of proof - Whether accused to raise a reasonable doubt.*

This was an appeal by the appellant against his conviction and sentence in respect of a charge of rape in which he was alleged to have raped a 13-year old child. Before the learned Judge, two questions of law were raised by the appellant. Firstly, whether the Sessions Court Judge in proceeding to record the evidence of the child complainant, had failed to apply s. 133A of the Evidence Act, 1950, and secondly whether the Sessions Court Judge had applied the wrong burden of proof in a defence of alibi set up by the appellant.

Held:

[1] There is a requirement in law pursuant to under s. 133A of the Evidence Act, 1950 that the unsworn evidence of a child of tender years has to be corroborated by some other material particular in support implicating an accused before he can be convicted. In the appeal there is a marked absence of corroboration.

[2] The Sessions Court Judge having formed an opinion that the complainant was a person of "immature age" had failed to take into account s. 133A of the Evidence Act, 1950 and, more importantly, he failed to apply his mind to s. 8 of the Oaths and Affirmations Act, 1949 (Revised 1977)

[3] It is desirable that the Sessions Court Judge should apply and record appropriate questions in the notes of evidence so as to ascertain whether the complainant understood the solemn duty of speaking the truth or not. The Sessions Court Judge should also record his opinion and reasons in arriving at the conclusions as to whether the complainant understood the solemn duty of speaking the truth or not.

[4] In a defence of alibi, the accused need only raise a reasonable doubt in order to earn an acquittal. In this appeal the Sessions Court Judge applied too high a burden on the appellant to bring home a defence of alibi.

[Appeal allowed. Appellant acquitted and discharged]

Cases referred to:

Krishna Kahar v. Emperor [1940] AIR Cal. 182 ***(refd)***
Chao Chong and Ors. v. P.P. [1960] 26 MLJ 238 ***(refd)***
Public Prosecutor v. Chan Choon Keong & Ors [1989] 2 MLJ 427 ***(refd)***
Ah Mee v. Public Prosecutor [1967] MLJ 220 ***(refd)***
Din v. Public Prosecutor [1964] 30 MLJ 300 ***(refd)***
Dato' Mokhtar Bin Hashim & Anor v. Public Prosecutor [1983] 2 MLJ 232 FC ***(not foll)***

Yau Heng Fang v. Public Prosecutor [1985] 2 MLJ 335 ***(foll)***
*Illian & Anor v. Public Prosecutor [1988] 1 MLJ 421****(foll)***

Legislation referred to:
Evidence Act, 1950, s. 133A
Oaths and Affirmations Act, 1949 (Revised 1977), s. 8
Criminal Procedure Code, s. 402A

For the appellant - Gurbachan Singh; M/s. Bachan & Kartar
For the respondent - Yong Zarida bte Sazali, DPP

JUDGMENT

Hj. Abdul Malik b. Hj. Ishak J:
After hearing arguments from both sides, I allowed the appeal and set aside the order of conviction and sentence and released the appellant forthwith. I do not propose to set out the facts at great length. It is sufficient to say that the complainant, aged 13 years, was allegedly raped by the appellant, her neighbour, on 30 August 1992 at about 3.15 p.m. in the appellant's unnumbered house at Ladang Bukit Klian, Selama, Perak.

This appeal revolves on two pertinent questions of law. Firstly, the failure of the Sessions Court Judge to apply s. 133A of the Evidence Act, 1950 before proceeding to record the evidence of the complainant. Secondly, the Sessions Court Judge applied the wrong burden of proof in a defence of alibi set up by the appellant.

The complainant was thirteen years of age at the time of the alleged rape and fifteen years of age when she gave evidence before the Sessions Court Judge. The Sessions Court Judge noted the following details before he proceeded to record the complainant's evidence:

> Saksi pada pandangan Mahkamah tidak memahami sifat sumpah yang hendak diberikan. Saksi beri keterangan tanpa sumpah.

Section 133A of the Evidence Act, 1950 which came into force on 1 November 1971 *vide* PU(A) 126/71 enacts briefly that for the unsworn evidence of a child, there is now a requirement in law that the unsworn evidence of any child of tender years has to be corroborated by some other material particular in support implicating an accused before he can be convicted. The Sessions Court Judge must have formed an opinion that the complainant was a person of "immature age" but unfortunately he failed to take into account s. 133A of the Evidence Act, 1950 and, more importantly, he failed to apply his mind to s. 8 of the Oaths and Affirmations Act, 1949 (Revised 1977). Since the Sessions Court Judge allowed the complainant to give an unsworn evidence, he should have cautioned the complainant to speak the truth, the whole truth and nothing but the truth following closely the words appearing in s. 8 of the Oaths and Affirmations Act, 1949 (Revised 1977). It is also desirable, in my considered view, that the Sessions Court Judge should apply and record appropriate questions in the notes of evidence so as to ascertain whether the complainant understands the solemn duty of speaking the truth or not. Arising out of this, the Sessions Court Judge should also record in the notes of evidence his opinions and reasons in arriving at the conclusions as to whether the complainant understands the solemn duty of speaking the truth or not. The notes of evidence would form the record of proceedings and, through it, the appellate Court will be able to ascertain whether the correct procedures had been adopted (*Krishna Kahar v. Emperor* [1940] AIR Cal. 182). It is rather unfortunate that the Sessions Court Judge completely misapprehended the law and floundered when confronted with this seemingly easy problem.

The significance of applying s. 133A of the Evidence Act, 1950 and s. 8 of the Oaths and Affirmations Act, 1949 (Revised 1977) can be fully appreciated when one bears in mind the danger as envisaged by Thomson C.J. (as he then was) in the case of *Chao Chong and Ors. v. P.P.* [1960] 26 MLJ 238 especially at page 240, where his Lordship said:

> ... that it is a matter of common knowledge that children at times find it difficult to distinguish between reality and fantasy.

His Lordship continued further that:

> They find it difficult after a lapse of time to distinguish between the results of observation and the results of imagination.

Faiza Thamby Chik JC (as he then was, now a High Court Judge) had occasion to remark as to the demeanour of a six (6) year old victim of kidnapping in the following words:

> Whatever she said in evidence in this trial, it must be scrutinized with special care, and children have the tendency to invent and distort.

(see *Public Prosecutor v. Chan Choon Keong & Ors* [1989] 2 MLJ 427 especially at page 431).

There is a marked absence of corroboration in this appeal. The complainant refused to reveal the identity of the rapist to her guardian. There were ample opportunities for the complainant to expose the rapist but she took her own sweet time. She only started to spill the worms out of the tin-can, so to speak, when her menstrual periods went hay-wire. In my judgment, there was no corroboration on the allegation of rape. Ong Hock Thye F.J. (as he then was) in delivering the judgment of the Federal Court in *Ah Mee v. Public Prosecutor* [1967] MLJ 220, a case where a girl rubber tapper alleging rape, said:

> With respect, corroboration in the legal sense connotes some independent evidence of some material fact which implicates the accused person and tends to confirm that he is guilty of the offence.

In *Din v. Public Prosecutor* [1964] 30 MLJ 300 F.C., Thomson L.P. (as he then was) speaking for the Federal Court had this to say on the question of corroboration:

> The desirability for corroboration of the evidence of the prosecutrix in a rape case (which in any event has not yet crystallized into something approaching a rule of law and which is still a rule of practice and prudence) springs not from the nature of the witness but from the nature of the offence.

Next, in regard to the burden of proof in a defence of alibi set up by the appellant, the Sessions Court Judge applied the decision of the Federal Court in *Dato' Mokhtar Bin Hashim & Anor v. Public Prosecutor* [1983] 2 MLJ 232 FC, where Abdoolcader F.J. said in the context of s. 402A of the Criminal Procedure Code (F.M.S. Cap.6) ("CPC"):

> the learned Judge in considering the defence of alibi appears to have decided the question on a balance of probabilities, thus throwing a probative but somewhat lighter burden on the first appellant. It is contended before us that this was a wrong approach as all that an accused person need do is to cast a reasonable doubt and that he does not in putting forward an alibi as an answer to a charge assume any burden of proving that answer, and we have been referred to English cases to this effect in support of this submission. The position here however would appear to be different in view of the provisions of section 402A of the Criminal Procedure Code with regard to notice to be given of a defence of alibi which was added by way of amendment to the Code with effect from January 10, 1976. The concluding words of section 402A(2) "for the purpose of establishing his alibi" are significant and would seemingly put a probative burden on an accused. The position in England would appear to turn on the specific provisions of section 11 of the Criminal Justice Act, 1967 and we would refer in particular to the provisions of sub-section (1) and the definition of

"evidence in support of an alibi in sub-section (8) thereof. The Supreme Court of India held in Gurcharan Singh & Anor. v. State of Punjab (1956) AIR SC 460, 462 that the burden of proving an *alibi* undoubtedly lies on the accused setting up the defence but even so, the burden of proof as to the guilt of the accused always remains on the prosecution irrespective of whether or not the accused has made out a plausible defence. In Public Prosecutor v. Chidambaram & Anor (1928) AIR Mad 791, 793 it was held that alibi evidence should be scrutinised very carefully, for it is easy to set up an alibi and not always easy to prove it, and it must be definitely proved in order to suffice for the rebuttal of a case made out by the prosecution.

In 1985, the Supreme Court refused to follow Dato' Mokhtar Hashim's case and preferred in construing s. 402A of the CPC, the usual evidential burden cast upon an accused person, i.e. to raise a reasonable doubt (see *Yau Heng Fang v. Public Prosecutor* [1985] 2 MLJ 335).

Wan Suleiman S.C.J. (as he then was) in *Illian & Anor v. Public Prosecutor* [1988] 1 MLJ 421 S.C. in construing the burden of proof under s. 402A of the CPC preferred to follow Yau Heng Fang's case. Thus, it is now clear that in a defence of alibi, the accused need only raise a reasonable doubt in order to earn an acquittal. Obviously the Sessions Court Judge in this appeal applied too high a burden on the appellant to bring home a defence of alibi.

Briefly, in his alibi defence the appellant testified that on that fateful day he attended a wedding reception and was not in his house. His evidence was supported by four (4) other defence witnesses. But the Sessions Court Judge summarily rejected the alibi defence on the ground that the appellant and his witnesses could not name the bride and the bridegroom. But the Sessions Court Judge failed to consider the evidence of Subramaniam s/o Arumugam (SP1), one of the prosecution witnesses, who testified that: "Pada 30 Ogos 1992 saya dengar ada perkahwinan berlangsung di kuil Redang Panjang." (see page 32 line D of the notes of evidence). It is apparent that the Sessions Court Judge did not view the whole of the evidence objectively and from all angles, with the result that the appellant had lost the chance which was, at that juncture, open to him of being acquitted.

In the circumstances, I had no alternative but to allow the appeal, quash the conviction and, to substitute in lieu thereof, an order of acquittal and discharge.